Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

SCOTT MURRAY; MICHAEL SCHNEIDER; KEVIN JOSEPH, the class of all students at the University of Colorado at Boulder who are being charged out-of-state tuition despite being residents and domiciliaries of the State of Colorado,

Petitioners,

v.

STATE OF COLORADO; UNIVERSITY OF COLORADO BOARD OF REGENTS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1871 and the Fourteenth Amendment abrogate the immunity of the State of Colorado.

2. Whether the Board of Regents of the University of Colorado is immune from suit under the Civil Rights Act of 1871.

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SCOTT MURRAY; MICHAEL SCHNEIDER; KEVIN JOSEPH, the class of all students at the University of Colorado at Boulder who are being charged out-of-state tuition despite being residents and domiciliaries of the State of Colorado, *Petitioners,*

v.

STATE OF COLORADO; UNIVERSITY OF COLORADO BOARD OF REGENTS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 6, 2005.

OPINION BELOW

The opinion of the Court of Appeals, reported at 2005 U.S. App. LEXIS 19245, appears in the appendix.

JURISDICTION

The judgment of the court of appeals for the Tenth Circuit was entered on September 6, 2005. A timely petition for rehearing *en banc* was denied on October 4, 2005, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights (Civil Rights Act of 1871)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners brought this action under 42 U.S.C. §1983. The respondents filed a motion to dismiss. The district court granted the motion. The district court ruled that petitioners did not have standing, and that the respondents were immune

from suit under the Eleventh Amendment to the Constitution of the United States. App.6. The Tenth Circuit affirmed, holding that respondents were immune from suit. App.1.

Individual petitioners, and the members of the class that they represent, graduated from high schools outside the State of Colorado. ¶12 of the Complaint. They moved to Colorado and have become citizens of the State of Colorado. They are all over the age of eighteen, but under the age of twenty-two, and have registered to vote in Colorado. App. 7, ¶¶3, 10 of the Complaint, App.7. Petitioners pay taxes in Colorado, have obtained drivers' licenses in the state and have registered vehicles in the States of Colorado. App.7, ¶¶4, 10 of the Complaint, App.7. Plaintiffs are not financially independent of their parents who reside outside the state of Colorado. App.7.

The State of Colorado treats two classes of its citizens differently. If a student at the University of Colorado graduated from a high school in the state of Colorado he or she automatically is allowed to pay in-state tuition. In-state tuition ranges from $4,020 to $5,081, while out-of-state tuition is $20,345 to $22,506, about five times as much. App. 7, 8, ¶¶18, 19 of the Complaint.

The state of Colorado contributes only $58.6 million per year to the University of Colorado as compared to $226 million paid for by the United States government. App. 8, ¶¶22, 25 of the Complaint. Out-of-state students pay approximately $175 million of the total costs of the University of Colorado and thus subsidize in-state students. ¶21 of the Complaint.

Those paying out-of-state rates are paying three times the amount that the state of Colorado is paying to support the University of Colorado. In other words, the University of Colorado, which has approximately one-third of its student body from out-of-state, exploits and profits from those out-of-state students.

Petitioners did not file an application with the University of Colorado for a determination that they were entitled to in-state benefits, because under state law they were ineligible. Petitioners admitted that they did not attend high school in Colorado, that they are under twenty-two years of age and that they are dependent on their parents. To insist that they apply for benefits that the University of Colorado is required to deny by the State of Colorado, is absurd. To make petitioners apply for benefits that they are statutorally ineligible for would require a futile and wasteful act.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Congress abrogated Colorado's immunity when it passed the Civil Rights Act of 1871. Justice Breyer noted recently that the 14th Amendment is the only recognized authority for abrogation. *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). *Active Liberty*, Justice Stephen Breyer, at 143, note 4. Alfred A. Knopf, 2005.

The Fourteenth Amendment provides:

> ***No state*** shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; ***Nor shall any state*** deprive any person of life, liberty or property without due process of law; ***nor deny to any person within its jurisdiction the equal protection of the laws.*** (emphasis added.)

The Fourteenth Amendment was clearly and unequivocally aimed at the states. As Justice Breyer noted, *supra*, this amendment, and the laws implementing it like the Civil Rights Act of 1871, abrogate immunity of the states.

Justice Scalia finds that:

> The evidence suggests that [in statutory/constitutional interpretation] we do not really look for subjective legislative intent. We look for a sort of 'objectified' intent the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. . . . It is the *law* that governs, not the intent of the lawgiver. *A Matter of Interpretation: Federal Courts and the Law, Antonin Scalia* (Princeton University Press, 1997) at *17*.

The objectified intent of the Fourteenth Amendment is that it applies directly to the states, and that laws implementing the Amendment abrogate the immunity of the states. That was the clear objective intent of the text of the Amendment and of the Civil Rights Act of 1871.

The Tenth Circuit ruled that Colorado and the Board of Regents of the University of Colorado are immune from suit. This is directly contrary to decisions of this court and directly contrary to the Fourteenth Amendment.

Congress has the power to abrogate the sovereign immunity of the states and their subdivisions. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

In the context of residency requirements of state universities, the Supreme Court has consistently ruled that the Civil Rights Act of 1871 allows lawsuits challenging discriminatory tuition schemes. *Vlandis v. Kline*, 412 U.S. 441 (1973); *Toll v. Moreno*, 441 U.S. 458 (1979); *Elkins v. Moreno*, 435 U.S. 647 (1978).

In *Vlandis*, the court noted:

> Appellees then brought suit in the District Court pursuant to the Civil Rights Act of 1871, 42 U. S. C. § 1983, contending that

> they were bona fide residents of Connecticut, and that § 126 of Public Act No. 5, under which they were classified as nonresidents for purposes of their tuition and fees, infringed their rights to due process of law and equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution. 1973 U.S. LEXIS 55 at 4.

This court struck down as unconstitutional the Connecticut law that appellees in that case were challenging. The *Vlandis* court conclusively ruled that university officials were not immune from suit under the Civil Rights Act of 1871.

Under the Supreme Court's ruling in *Saenz v. Roe*, 526 U.S. 489 (1999), states do not have the right to determine who is, and who is not, a citizen of the state. Citizens have the right to choose the state of their domicile.

The state of Colorado has no right to discriminate against new residents of the state in favor of those who have lived in Colorado for many years. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court said such discrimination:

> would logically permit the State to bar new residents from ***schools***, parks, and libraries or deprive them of police and fire protection. Indeed, it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. 394 U.S. at 632-633 (emphasis added).

The state of Colorado is attempting to bar or limit new residents from attending the University of Colorado by its scheme to require students who graduated from high schools

in other states to jump through impossible hoops before allowing them to become full residents of the state of Colorado. This violates the Supreme Court's rulings in *Shapiro* and *Vlandis*, *supra*.

Colorado's one-year absence requirement presents a different question. The Supreme Court upheld a one-year residency requirement in *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970) summarily affirmed, 401 U.S. 985 (1971). However, in the *Vlandis* decision, *supra*, Justices Marshall and Brennan wrote in their concurring opinion:

> But I now have serious questions as to the validity of that summary decision (*Starns v. Malkerson*) in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed upon bona fide state residents. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

This court has recently ruled that durational residency requirements are unconstitutional. *Saenz v. Roe*, 526 U.S. 489 (1999). In the *Saenz* case, the Supreme Court struck down as unconstitutional a California statute that limited welfare benefits for the first year of residency in the state. The court ruled that the right to travel prohibited states from denying travelers "who elect to become permanent residents, the right to be treated like other residents of the state." 526 U.S. at 500. The court explained:

> Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S. Const. Amdt. 14, §1. ***The States, however,***

> ***do not have any right to select their citizens.*** 526 U.S. at 510, 511 (emphasis added).

The court noted approvingly the reasoning from Justice Bradley in the *Slaughterhouse Cases*, 16 Wall. 36 (1872):

> The states have not now, if they ever had, any power to restrict their citizenship to any classes of persons. A citizen of the United States has a perfect constitutional right to go to and reside in any state, and to claim citizenship therein, and an equality of rights with every other citizen . . . 16 Wall. At 112-113, 526 U.S. at 503, 504.

Similarly, the state of Colorado does not have the right to refuse citizenship or equal benefits of citizenship to petitioners. Petitioners have chosen the state of Colorado as their permanent home and are thus entitled to all privileges and immunities as other citizens of the state.

The Supreme Court of Colorado has ruled that the University of Colorado is a person under the Civil Rights Act of 1871. *Uberoi v. University of Colorado*, 713 P.2d 894 (1986), cert. denied, 489 U.S. 1019 (1989); rehearing denied, 490 U.S. 1032 (1989). The Colorado Supreme Court has limited that ruling to the University of Colorado. *Graham v. State of Colorado*, 956 P.2d 556 (1998). See also *University of Colorado v. Booth* (Case No. 02SC738, Supreme Court of Colorado, 2003).

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING STATE UNIVERSITIES DISCRIMINATING AGAINST NEW RESIDENTS OF THE STATE

When this court struck down segregated schools in 1954 in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S.

483 (1954), we lived in a segregated nation. Now our primary and secondary schools are substantially integrated. However, our public colleges and universities are not.

Petitioners, who graduated from high schools in California and Maryland, alleged in the complaint that the University of Colorado is more accurately characterized as a national university than a state university. The complaint alleged that the State of Colorado contributed $58.7 million to the University for fiscal year 2003-2004. At the same time the federal government contributed $226 million to the University of Colorado, approximately four times the amount paid by the state. The total tuition paid by students charged out-of-state tuition was $175 million for the same period.

In-state students paid from $4,000 to $5,000 per year, while out-of-state tuition rates were from $20,000 to $22,000. The state of Colorado's payment to the University represents $3,005 per in-state student, while those paying out-of-state tuition rates were charged $15,000 to $17,000 more than in-state students. Those paying out-of-state rates are subsidizing in-state students by more than $100 million per year. See complaint, paragraphs 18-26.

The court can take judicial notice of the fact that Colorado is a very "white" state, with very few African-American residents. According to the United States Census Bureau, the black population was 12.78% of the total population of the United States. In contrast, the African-American population represents 4.34% of the Colorado population. www.census.gov/population/estimates/state/srh/srh99.txt. According to the Census Bureau, Maryland's African-American population was 28.12% of the total state population, while California's African-American population was 7.50% of its total population. *Id.*

The court can also take judicial notice of the fact that Colorado has a very small Jewish community as compared with Maryland, for example, where two of the petitioners went to high school. Colorado's Jewish population rep-

resents 1.7% of its total population, compared to Maryland's Jewish population of 4%. www.Jewishvirtuallibrary.org/jsource/US-Israel/usjewpop.html.

The effect of Colorado's discriminatory tuition scheme is to prevent out-of-state students, those of color, as well as Jews and other minorities, from attending the University.

Now is the time for this court to decide whether state Universities have the unfettered right to put up barriers against out-of-state students by use of discriminatory tuition charges. Just as public elementary and secondary schools have benefited from *Brown v. Board*, *supra*, and the diversity that it has spawned, state colleges and universities would also benefit from a more diverse student base.

CONCLUSION

In conclusion, the Tenth Circuit's ruling is contrary to this court's rulings in *Vlandis* and *Saenz*, *supra*. Petitioners, having reached the age of majority and having chosen Colorado as their permanent home, who vote there and pay taxes there, have the right to the same privileges and immunities as other citizens of the state of Colorado, including the payment of in-state tuition rates. For all of these reasons the writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SCOTT MURRAY; MICHAEL SCHNEIDER; KEVIN JOSEPH, the class of all students at the University of Colorado at Boulder who are being charged out-of-state tuition despite being residents and domiciliaries of the State of Colorado,

Plaintiffs - Appellants,

v.

STATE OF COLORADO; UNIVERSITY OF COLORADO BOARD OF REGENTS,

Defendants - Appellees.

ORDER AND JUDGMENT[*]

Before **TACHA**, Chief Circuit Judge, **EBEL**, and **McCONNELL**, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiffs-Appellants Scott Murray, Michael Schneider, and Kevin Joseph, all of whom are students at the University of Colorado, filed a claim against the State of Colorado and the University of Colorado Board of Regents pursuant to 42 U.S.C. § 1983. On behalf of a proposed class of students paying out-of-state tuition, the Plaintiffs challenged the

University's out-of-state tuition policy as violating their rights under the Fifth and Fourteenth Amendments, as well as their right to travel. The District Court dismissed the suit for lack of subject matter jurisdiction. We AFFIRM.

I. BACKGROUND

The University of Colorado determines residency status for tuition purposes according to Colorado's Tuition Classification Statute, Colo. Rev. Stat. Ann. § 23-7-101 et seq. The statute provides a list of presumptions that determine a student's residency status "[u]nless the contrary appears to the satisfaction of the registering authority of the institution at which a student is registering." Colo. Rev. Stat. Ann. § 23-7-103(1). The Plaintiffs all pay out-of-state tuition, and none has ever applied to pay in-state tuition.

The Plaintiffs filed suit against the State of Colorado and the Board of Regents of the University of Colorado arguing that the Defendants deprived them of the equal protection of the laws, the right to travel, and property without due process of law, in violation of 42 U.S.C. § 1983. They sought declaratory relief, injunctive relief, and a partial tuition refund. The Defendants then moved to dismiss for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). After determining that the State of Colorado was entitled to Eleventh Amend-ment immunity and that the Plaintiffs did not have standing to bring suit against the Board of Regents, the District Court granted the Defendants' motion

II. DISCUSSION

Whether a defendant is immune from suit under the Eleventh Amendment and whether a plaintiff has standing to sue are both questions of the federal courts' subject matter juris-diction. *See Thompson v. Colorado*, 278 F.3d 1020, 102324 (10th Cir. 2001) (Eleventh Amendment immunity);

Lujan v. Defenders of Wildlife, 504 U.S. 555, 559560 (1992) (stan-ding). We therefore review the District Court's dismis-al de novo. *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004).

We first review the court's decision to dismiss the Plaintiffs' claim against the State of Colorado on the basis of its Eleventh Amendment immunity. The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Plaintiffs contend that the Eleventh Amendment does not apply in this case because they are citizens of Colorado, as opposed to citizens of another state. The Eleventh Amendment, however, has long been understood as standing for a principle broader than its language: that the Constitution should not be construed to abrogate the traditional sovereign immunity of states in federal court, regardless of the citizenship of the plaintiff. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Therefore, Colorado is immune from suit unless it has waived its immunity or consented to suit, or if Congress has validly abrogated the state's immunity. *See Harris v. Owens*, 264 F.3d 1282, 1290 (10th Cir. 2001). Here, the Plaintiffs do not argue that Colorado waived its sovereign immunity or consented to suit, contending only that Congress has abrogated the state's immunity through the enactment of § 1983. It is well-established, however, that § 1983 does not abrogate a state's Eleventh Amendment immunity. *See Quern v. Jordan*, 440 U.S. 332, 341, 345 (1979). Nonetheless, the Plaintiffs cite *Vlandis v. Kline*, 412 U.S. 441 (1973), as implicit authority that "students have the right under 42 U.S.C. § 1983 to sue a state university." The facts of that case do not support the Plaintiffs' argument here. In *Vlandis*, a group of University of Connecticut students challenged the university's tuition classification policy in a suit against the university's director

of admissions--not against the state itself. *Id.* We therefore hold that the State of Colorado is immune from suit under the Eleventh Amendment, and that the District Court properly dismissed the Plaintiffs' claim against Colorado for lack of subject matter jurisdiction.

We next turn to the court's decision to dismiss the Plaintiffs' claim against the University of Colorado Board of Regents for lack of standing. We need not address this issue, however, because the Colorado Board of Regents is, like the state itself, entitled to Eleventh Amendment immunity. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 494 n.3 (10th Cir. 1998) ("[W]e have no doubt that UNMSM, its Regents, and the Committee on Admissions are 'arms of the state,' entitled to Eleventh Amendment immunity."); *Lujan v. Regents of Univ. of Cal.*, 69 F.3d 1511, 1522 (10th Cir. 1995) (holding that the University of California's Board of Regents is shielded from suit under the Eleventh Amendment); *Hensel v. Office of Chief Admin. Hearing Officer*, 38 F.3d 505, 508 (10th Cir. 1994) ("[U]nder Oklahoma law, the Board of Regents of the University is an arm of the state . . . ."); *Hartman v. Regents of Univ. of Colo.*, 22 P.3d 524, 528 (Colo. Ct. App. 2000) (holding that the University of Colorado is an arm of the state for purposes of sovereign immunity). Moreover, nothing in the record indicates that the Board waived its immunity or that Congress has abrogated it.[1] As a result, we affirm the District Court's dismissal of the Plaintiff's suit against the University of Colorado's Board of Regents.

III. CONCLUSION

Because both the State of Colorado and the Board of Regents are entitled to sovereign immunity under the Eleventh Amendment, we AFFIRM the District Court's dismissal of this suit for lack of subject matter jurisdiction.

ENTERED FOR THE COURT,
Deanell Reece Tacha
Circuit Judge

FOOTNOTES

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1]We also note that the fact that the Plaintiffs seek injunctive relief has no bearing on the Board's Eleventh Amendment immunity. *See Ex Parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974) (permitting suits for prospective injunctive relief against individual state officials in their official capacities). The Plaintiffs in this case have not sued any individual Board member, instead naming only the State of Colorado and the Board of Regents of the State of Colorado as defendants. Therefore, because the Eleventh Amendment applies to all suits against the state and arms of the state, regardless of the relief sought, *see Higganbotham v. Okla. Transp. Com'n*, 328 F.3d 638, 644 (10th Cir. 2003), the type of relief sought is not relevant to our analysis in this case. *See id.* ("In the instant case, the plaintiff has directly sued the state and its agencies seeking declaratory and injunctive relief, and Eleventh Amendment immunity squarely applies in these circumstances.").

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-WM-2668 (OES)

SCOTT MURRAY; MICHAEL SCHNEIDER; KEVIN JOSEPH, the class of all students at the University of Colorado at Boulder who are being charged out-of-state tuition despite being residents and domiciliaries of the State of Colorado,

Plaintiffs

v.

STATE OF COLORADO; AND
BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO,

Defendants

ORDER

Miller, J.

This matter is before me on defendants State of Colorado ("Colorado") and Board of Regents of the University of Colorado ("the Board of Regents") ("Defendants") motion to dismiss, filed February 17, 2004. For the reasons that follow, the motion will be granted.

Background

In this action, plaintiffs Scott Murray, Michael Schneider, and Kevin Joseph ("Plaintiffs"), purporting to represent "the class of all students at the University of Colorado at Boulder who are being charged out-of-state tuition despite

being residents of the State of Colorado," challenge Colorado's statutory scheme gov-erning the determination of whether a student qualifies for in-state tuition at Colorado's universities. As alleged in Plaintiffs' com-plaint, the facts are as follows,

Plaintiffs are all students at the University of Colorado, ranging in age from nineteen to twenty-one years. (Compl., ¶¶3, 13.) They are registered to vote in Colorado and "pay taxes in Colorado. (Compl., ¶2) However, they did not attend high school in Colorado, their parents do not reside in Colorado. (Compl., ¶3) and they presumably are not emancipated. See Colo. Rev. Stat.§23-7-103(1)(a).

Plaintiffs complaint is not a model of clarity. However, it appears to allege that the Defendants' tuition policies are unconstitutional for the following reasons. According to Plaintiffs, Colorado's statutory scheme provides that any student who is younger than twenty-two and unwilling to become emancipated from his or her parents will receive in-state tuition only if the student's parents live in Colorado, and is therefore unconstitutional. See Colo.Rev.Stat. §23-7-103(1)(a) (domicile of unemancipated minor is presumed to be that of his or her parents; (Compl., ¶16). Plaintiffs also allege that Colo.Rev.Stat.§23-7-102 (5), which requires a per-son to reside in Colorado for one year before being eligible for in-state tuition, is unconstitutional. (Compl., ¶17). Plaintiffs allege that in-state tuition is significantly less than that charged out-of-state students, and that because instate students pay so much less, their tuition is subsidized by the students paying out-of-state tuition. (Compl., ¶¶18-26).

Specifically, Plaintiffs assert the following claims: (1) Defendants have deprived Plaintiffs of equal protection of the laws, their right to travel, and their property without due process of law, in violation of 42 U.S.C. §1983 (Compl., ¶¶33-36); (2) Defendants have been deprived of their property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Consti-

tution (Compl., ¶¶37-38);[1] and (3) Plaintiffs are entitled to equal protection and due process. (Compl., ¶¶39-40). As remedies, Plaintiffs seek (1) a declaration that Colorado's out-of-state tuition system is unconstitutional (2) a declaration that Colorado's requirement that a student be domiciles in Colorado for one year preceding registration in order to qualify for in-state tuition is unconstitutional; (3) an order requiring the Board of Regents to allow any student who registers to vote in Colorado to pay in-state tuition; (4) a refund of the tuition in excess of in-state tuition previously paid by plaintiff and the class members; and (5) any other relief warranted in the interests of justice.

On February 17, 2004, Defendants moved for dismissal under Rules 12(b)(1) and (6) arguing, among other things, that Plaintiffs lack standing and the Defendants are immune from suit under the Eleventh Amendment.

Standard of Review

Under Fed.R.Civ.P. 12(b)(1), a motion to dismiss should be granted if the Court does not have subject matter jurisdiction over the case. A motion to dismiss for lack of subject matter jurisdiction may constitute either a facial or factual challenge. *United States v. Holt*, 46 F.3d 1000, 1002 (10th Cir. 1995). Where, as here, the motion attacks the sufficiency of the complaint's allegations, it constitutes a facial challenge, and the court must accept the complaint's allegations as true. *Id.*

A motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) should be granted when it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief. The court must accept as true all well-pleaded facts and construe all reasonable allegations in the light most favorable to the plaintiff. *United States v. Colorado*, 87 F.3d 1161, 1164 (10th Cir. 1996).

1. It is not clear from the complaint how the second cause of action is any different from the due process violation in the first cause of action.

Discussion

Defendants first argue that the named Plaintiffs lack standing to bring this suit. To demonstrate standing, a plaintiff must establish three elements: (1) injury in fact; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Buchwald v. Univ. of New Mexico Sch. Of Med.*, 159 F.3d 487, 492-93 (10th Cir. 1998). The merits of a plaintiff's claims are immaterial to whether the plaintiff has standing. *Id.* at 493.

Defendants do not dispute the first and third elements, but argue that Plaintiffs have not established a causal relationship that they applied for in-state tuition. See *D.L. v. United Sch.Dist.*, 270 F.Supp. 1217, 1253 (D. Kan. 2003) (students, suiting through their parents, who had been forced to stop attending public school in one district because they did not live within the district's boundaries, had no standing to protest district's nonresident admissions policy because they had never applied for non-resident admission. Plaintiffs do not directly respond to this contention, but argue that their injury, paying higher tuition than in-state students, is caused by Colorado's statutory scheme that makes it difficult for students such as themselves to become qualified for instate tuition.

A causal relationship between the injury and the challenged conduct is established when the injury can fairly be traced to the challenged action of the defendant. *Buch-wald*, 159 F.2d at 493. Here, Plaintiffs complaint fails to allege that Plaintiffs' injury was caused by enactment of the statutory provisions to which they object. (See Compl., ¶¶16 & 17; Pl.'s Opp. Mot. Dismiss at 2, arguing causation by claiming "[Plaintiffs are being charged with out-of-state tuition because of unconstitutional rules that were set up to make it difficult for a student to become a resident of Colorado"). Thus, although Plaintiffs have alleged a causal connection as to Colorado, acting through its legislature, they have failed to

allege a causal connection between their asserted injury and any action by the Board of Regents. As a result, I find that Plaintiffs have not established standing to bring their claims against the Board. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). (plaintiff must at least make general factual allegations of injury resulting from the defendant's conduct).

Next, Defendants argue that they are immune from suit under the Eleventh Amendment.[2] The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has interpreted this language to establish that "an unconsenting State is immune from suits brought in federal court by her own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (internal quotations omitted). Consequently, "in the absence of consent, a suit in which the State of one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment . . .regardless of the nature of the relief sought." *Id. See also Buchwald*, 159 F.3d at 495-96 (finding University of New Mexico Medical School, its Regents, and the Committee on Admissions, as "arms of the state," were immune under the Eleventh Amendment from suit by rejected applicant seeking declaratory judgment, injunctive relief and damages).

2. Because I have found the Plaintiffs have not established standing for their claims against the Board of Regents, I need only analyze this issue with regards to Colorado. However, I note that courts have consistently found that the University of Colorado and its Board of Regents are arms of the state. *Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989); *Smith v. Plati*, 56 F.Supp.2d 1195, 1198, 1201 (D. Colo. 1999); *Hartman v. Regents of the Univ. of Colorado*, 22 P.2d 425, 428 (Colo. App. 2000). Consequently, even if Plaintiffs had standing to assert their claims against the Regents, the Eleventh Amendment analysis described below also bars Plaintiffs' claims against them.

Plaintiffs' sole argument is that I am bound by *Vlandis v. Kline*, 412 U.S. 441, 444 (1973), in which they claims the University of Connecticut was not held immune from suit when students objected to a Connecticut statute determining residency classifications. However, Plaintiffs gravely misstate the facts in *Vlandis*, because neither Connecticut nor any of its agencies, including the University of Connecticut, were named as defendants. Consequently, *Vlandis* has no relevance to Defendants' argument.

Plaintiffs do not allege that Defendants have consented to this suit or waived their immunity, and I find no reason to conclude they have. Consequently, I find that the Eleventh Amendment bars the Plaintiffs' claims against Colorado and the Board of Regents. As plead, these Defendants are immune from the relief sought, including any prospective relief. *See Buchwald*, 159 F.3d at 495-96. This case should be dismissed for lack of subject matter jurisdiction.

According it is ordered:

1. Defendants' motion to dismiss, filed February 17, 2004, is granted.
2. This case is dismissed without prejudice
3. Defendants may have their costs.

DATED at Denver, Colorado this 17th day of August, 2004.

Walker D. Miller,
District Judge